

STATE OF MICHIGAN
COURT OF APPEALS

LANCE N. LEMMEN,

Plaintiff-Appellant/Cross-Appellee,

v

BARBARA LEMMEN,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

February 9, 2010

No. 279832

Ottawa Circuit Court

LC No. 04-048561-DM

Before: Wilder, P.J., and Meter and Servitto, JJ.

Wilder, P.J., (*dissenting in part*).

I respectfully dissent in part. I would conclude that the trial court erred in applying the lack of control and lack of marketability discounts to the valuation of plaintiff's interest in the Admiral Petroleum Holding company.

A

The parties married in 1977. In December 1986, Lemmen, Inc., which was owned by plaintiff and his three brothers, equally, purchased 50% of Admiral Petroleum Holding Company for \$1.7 million. The sole asset of that holding company was Admiral Petroleum Company, Inc. In 1988, Lemmen, Inc., purchased the remaining 50% of the holding company for \$1.7 million. In 1991, Lemmen, Inc., merged into the holding company, with Admiral Petroleum Company, Inc. ("Admiral"), being the surviving corporation. By October 1991, Admiral was able to repay the debt associated with the purchases.

The four brothers are the board of directors. Plaintiff has been a director since 1987. Plaintiff is vice-president of the company. It is undisputed that Dennis Lemmen is and has been president of the company, and in charge of its day-to-day operations. Dennis proclaims himself a dictator, but recognizes that he serves at the pleasure of the majority of shareholders, i.e., his brothers. Dennis recognized in his testimony that he must operate Admiral under the "blessing" of Lance, Doug, and Todd Lemmen.

In December of 1990, Dennis Lemman tried unsuccessfully to buy-out each of his brothers for \$2 million each. The brothers executed a buy-sell agreement, with an addendum setting the value of shares. The addendum was periodically modified, to update the value of the shares. The last time they set the value of shares was 1997, when a 25% interest was set at \$8.87

million. Plaintiff's expert at valuation, Neil DeBoer, testified that as of December 31, 2004, under the shareholder buy-sell agreement, the updated value of a 25% interest was \$15 million.

Admiral's cash flow was so strong that it financed its own growth, without bank loans or long-term debt. Admiral's business was so profitable that, according to Eric Adamy, one of defendant's experts, it distributed to its shareholders an average of \$4.8 million each year (about \$1.2 million to plaintiff and each of his brothers). As of December 31, 2005 (the valuation date), Admiral had also accumulated over \$15 million in cash, and over \$19 million in a trading account at Merrill Lynch. Thus, Admiral's cash and cash equivalents totaled \$34.4 million at the end of 2005. Dennis Lemmen testified that half of Admiral's asset base of \$67 million was held in cash or "marketable securities" ("trading securities"). Dennis Lemmen testified that Admiral is an "S-corporation," and that its retained earnings by the end of 2005 had grown to \$45.5 million.¹

The value of plaintiff's shares of Admiral stock was an issue at trial. There were competing experts. DeBoer, whose testimony was stricken by the trial court, calculated the value of plaintiff's shares in Admiral at approximately \$5.5 million. Adamy valued plaintiff's share of the stock at \$17.5 million. The trial court ultimately valued plaintiff's shares at nearly \$11 million, applying discounts for lack of marketability and lack of control. However, plaintiff's share of Admiral's retained earnings (earnings on which the shareholders have already paid income taxes) is, by itself, \$8.4 million.

B

In *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992), the Supreme Court held that in a divorce case:

[t]he appellate court must first review the trial court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. But because we recognize that the dispositional ruling is an exercise of discretion and that appellate courts are often reluctant to reverse such rulings, we hold that the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable.

The Supreme Court further noted in *Sparks* that the following factors are relevant in determining the disposition of marital property in a divorce proceeding:

- (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8)

¹ It is undisputed that under the federal Internal Revenue Code, income accruing to a corporation formed under subchapter S "passes through" to its shareholders, who pay income taxes on it. This eliminates double taxation of corporate earnings.

past relations and conduct of the parties, and (9) general principles of equity. [*Sparks, supra*, 440 Mich at 159-160.]

C

On cross-appeal, defendant argues that the trial court erred in applying lack of control (LOC) and lack of marketability (LOM) discounts to plaintiff's shares in Admiral. Defendant also argues that the trial court should not have applied LOM discounts to the liquid assets of Admiral, including the money held in the accumulated adjustment account, because those assets were available and marketable, and because they represent income "constructively received during the marriage." Under the facts of this case, I agree.

Under the circumstances here, I would conclude that application of a lack of control and lack of marketability discounts by the trial court resulted in an unfair and inequitable distribution. The trial court relied on the fact that Adamy applied the discounts in a 2001 case involving the valuation of the stock of Dennis Lemmen, plaintiff's brother. However, Adamy testified that he prepared 3 to 4 valuations per year of the stock of closely-held corporations and that it was his practice to *never* apply a discount, and that he only did so as an exception with the stock of plaintiff's brother Dennis because he was asked to do so by the lawyers in that case. The trial court made no inquiry as to the rationale for applying the discounts in that instance, and the trial court also made no inquiry as to the amount of cash or cash equivalents of the company in 2001, the composition of the asset base, or the amount of retained earnings of the company in 2001. All of these factors were relevant to a determination whether the circumstances were sufficiently similar in the two cases to apply the same discounts in both cases, particularly where Adamy was clear that he specifically deviated from his usual practice not to apply discounts only because he was asked to do so by the lawyers in the prior case.²

Moreover, it is undisputed that, during the marriage, the parties paid income taxes on \$8.4 million in past profits that rests undistributed in the accumulated adjustment account. Defendant's argument that the trial court clearly erred in valuing plaintiff's shares of Admiral is well placed, in part because defendant, whether he is in control of the company or not, can nevertheless still access the accumulated adjustment account and the \$8.4 million. This undistributed profit no doubt has some buoyant effect on the value of the company. Moreover, it is noteworthy that there is no discount applied to the \$8.4 million in cash awaiting distribution to plaintiff at some future date. That is a real figure on which defendant contributed to the payment of taxes during the marriage. Thus, the fact that plaintiff continues to own the asset as well as have access to the undistributed profit, while defendant was awarded a discounted value of the stock, leads me to the firm conviction that the trial court's distribution amounted to an inequity that violates the principles espoused in *Sparks*.

In *Owens v Owens*, 41 Va App 844, 854; 589 SE2d 488 (2003), the Virginia Court of Appeals noted that, when considering the application of a minority discount interest to the value

² It seems evident the request was made to facilitate a negotiated settlement of the property division in the prior case, because the previous case was resolved without trial.

of stock in a family owned company, it applies the concept of “intrinsic value” to determine the worth of certain properties to the parties, stating that value cannot be limited to the objective criteria commonly used in open market transactions:

The item may have no established market value, and neither party may contemplate selling . . . the item; indeed, sale may be restricted or forbidden. Commonly, one party will continue to enjoy the benefits of the property while the other must relinquish all future benefits. Still, its intrinsic value must be translated into a monetary amount. The parties must rely on accepted methods of valuation, but the particular method of valuing and the precise application of that method to the singular facts of the case must vary with the myriad situations that exist among married couples.

The Owens court further noted that “when the controlling interests in a family company oppress a minority shareholder or use a ‘substantial amount of the corporation’s assets’ for their own personal benefit, the trial court may take that fact into account in determining the value . . . of the minority interest.” *Owens, supra*, 41 Va App at 855.

Though not binding on this Court, *Owens* is persuasive as applied to the facts here and should be adopted by this Court. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 494 n 5; 686 NW2d 770 (2004). The application of *Owens* to the facts of this case would be consistent with the principles set forth in MCL 450.1489, which protects the rights of a minority shareholder to receive “fair value” for the minority stock interest

For the foregoing reasons, I dissent in part from the majority’s opinion. I would remand for further proceedings and redistribution of the property in this case, consistent with the equitable principles espoused in *Sparks*.

/s/ Kurtis T. Wilder